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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503.

RAU CONSTRUCTION COMPANY, A CORPORATION,
PETITIONER AND APPELLEE BELOW,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Reasons Relied On for Allowance of the Writ—

I. The decision on appeal fundamentally erred in basic questions of substance and of special importance in the permanent public interests and in the public interests particularly affected in the present emergency.

The opinion contravenes good morals, public policy and Engineering ethics. It rewards the authorized deceit of Phillips Petroleum Company, but denies the simple arithmetic and common sense clearly demonstrated in trial Findings.

The errors gravely affect the Construction Industry and the Engineering Profession. Every concept of "unit price" construction contracts is nullified. That important type of engineering contract is designed to avoid delay to wait for detailed plans.

The Construction Industry is endangered by the approval of fraud, where it may readily be perpetrated, as the facts here illustrate. The Engineering Profession is bewildered by the decision.

The District Courts of the Eighth Circuit are obliged to grant others the fruits of deceit in inducing "unit price" construction contracts.

The decision erred in ignoring lawful trial Findings and in refusing to apply the controlling Missouri law and the same law declared at the same Term, to govern other litigants. Justice and equal protection of laws was thereby denied, contrary to the accepted course of judicial proceedings and to the law repeatedly declared here.

There is a firm faith in this Court to decide the questions and to correct the basic errors made on appeal or, otherwise, the now vital Construction Industry would be paralyzed and an unfavorable reflection of the United States Courts would follow, contrary to the public interests and the interests of the Judicial System 18

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OCTOBER TERM, 1942.

No. _____.

RAU CONSTRUCTION COMPANY, A CORPORATION, PETITIONER AND APPELLEE BELOW,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, RESPONDENT AND APPELLANT BELOW.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Rau Construction Company, a corporation, respectfully shows to this Honorable Court:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

1. An Eighth Circuit opinion of August 19, 194[illegible] (R. 1987; 130 F. 2d 499), reversed judgment of $140,582.53 allowed petitioner, as *quantum meruit* value of concrete construction work, accepted November 14, 1939, by Phillips Petroleum Company, as a small part of a seven million dollar refinery extension and polymerization "program," at Borger, Texas (R. 94). Petitioner's loss on reversal exceeds $150,000. *The grave errors of substance and of special importance in the public interests, and in the interests of the Construction Industry and Engineering Profession, which outweigh in importance even the loss affecting petitioner's solvency, are summarized, with the opinion, in "Reasons Relied Upon," infra,* p. 18, and are not here repeated.

2. An April 10, 1939, "unit price"[1] construction contract was induced, before structure plans were completed, by false engineering information and a false "cross section," supplied by Phillips' Engineer, acting in the scope of his employment. All information given was solely within Phillips' knowledge. That it was given, but was "not accurate" and "not intended to be accurate," and that the "cross section" was not "intended to constitute a true and representative 'cross section' of the work to be done" is affirmed by Paragraphs 4 to 23 (R. 61, 66) of Phillips' prolix trial Answer. Part of the information was supplied in Oklahoma (Par. 13). The April "contract" was signed by Mr. Gus Rau and delivered in Missouri (Par. 17, R. 65). Paragraph 20 and Exhibits to Answer, pages 72, 74, concede that before the Missouri contract was delivered, plaintiff assumed all of the liabilities of Phillips' project. Paragraph 15, R. 45, of the original Answer admits performance by plaintiff and acceptance by Phillips. Findings 12, 15 and 19 (R. 1905, 1909) establish that the assumption of liabilities was made voluntarily, to save Phillips a bond premium (about $4,000). In assuming the liabilities and in taking over the work on May 18, 1939, under its assumption of liabilities, at the request of Mr. Rau and with Phillips' consent, plaintiff relied, and was entitled to rely, on the truth of the representations made to Mr. Rau (plaintiff's officer and a director). The financial statement (R. 73), attached to Phillips' Answer, discloses the inevitable effect of the reversal. Reliance by plaintiff or Mr. Rau on the "infor-

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[1]From Annotation, 76 A. L. R. 269:

"It may be further observed that apparently, as to contracts undertaken upon the *unit basis*, as distinguished from contracts in gross, *special importance is generally attached to the work being other than as defined;* for in many of such cases the contract may be readily interpreted as one to perform only work of the indicated character."

From "Concrete Construction," Vol. 7, Encyc. Americana 469-70 (1941):

"The cost of concrete depends on the cost of cement, sand and stone, *upon conditions of work and size of work.* Where forms are simple, costs range from $5 to $10 per yard. Thin sections with expensive forms and handling may bring this up to $25 per yard. A reliable estimate must take account of all of the circumstances."

Italics where used throughout, are ours.

mation" is denied, but *on that narrow fact issue*, the trial court, of long and expert experience in engineering and construction cases, determined by Finding 15 (R. 1906):

3.

"From all of the evidence and inferences properly drawn therefrom, the only possible logical finding is that defendant furnished information substantially as claimed by plaintiff, without determining or knowing that it was true, and after undertaking to furnish information failed to make full disclosure of the facts; that Gus Rau, Jr., and plaintiff relied thereon and were entitled so to do, and that the information given and withheld substantially deceived Mr. Rau and plaintiff and misrepresented the *nature, size and kind of work* done, and damages resulted therefrom to plaintiff. Mr. Gus Rau, Jr., in signing the 'form of contract,' and plaintiff, in assuming liability to defendant and when it did the work, both relied on the representations made" (No. 15, R. 1906; cf. 1938-45).

Finding 8, R. 1904, determined (omitting immaterial words):

"Defendant knew that the information was sought as a basis to propose 'unit prices.' *The expected average cubic yards of concrete*, with the other information given, *intimately and directly affected the costs of doing the proposed work* and the amounts to be bid therefor. Materiality was known to defendant. *Mr. Hubbell testified (that) the size of items was a factor affecting costs.* If he read further from the 'cost estimate' the later figures would disclose smaller units, as most of the items read represented larger ones. Full disclosure of all facts available to and known by defendant was not made. Amended Answer, Third Defense (R. 62) *speaks for itself*, and need not be repeated."

Finding 7 (R. 1903) and No. 19 (R. 1909) establish *that correct engineering computations made on the information given* were used for the "unit prices" in the April "contract."[2]

[2]Mr. Rau (R. 1938-45) testified that an engineering "cross-section" should uniformly apply throughout a job. Phillips' En-

4. The Conclusions of Law establishing invalidity of the April "contract" and of a June 17th price memorandum, are not mentioned on appeal (R. 1931, 1932; R. 1922). All reference to Findings establishing compulsion and duress of goods are omitted. The reason therefor can only be the inevitable *felo de se*, following any mention of either. Finding 20 and Finding 24 (R. 1910 and 1917) (omitting immaterial words) read:

> "About June 16th, 17th and 18th, 1939, meetings were held at the work site. Defendant threatened to 'take over the job' and hold all money until completion if the work was not speeded up.
>
> Plaintiff had set up a central ready mix concrete plant, and assembled a quantity of material, tools and equipment, all located in defendant's fenced-in premises to which access was had only when passed by a gate watchman. Commitments were made for other material. Part of the work was incomplete. It was impractical for plaintiff to discontinue the work,

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gineer Hubbell said that the figures which he had read represented approximately 2,500 yards and "we could consider the rest of the concrete to be the same" average size.

The "cross section" and engineering information was relied on to compute the average *unit sizes, nature and conditions* (which are the "cost factors") of the project as it was thus represented. **The prices computed are specified in the April "contract" (R. 14).** The computations are detailed, R. 231-33, 261-268, and appear in Exhibits 2 and 3, R. 239, 257. The number of concrete pours for about 2/3 of the items was discussed with Phillips (R. 1498, 1499, 1501). Finding 7, R. 1903, determines that the computations were made correctly and Nos. 15 and 19, R. 1506-09, that they were properly relied on. The average size of structures determines the number of work operations. Finding 26, R. 1918, details the 9,485 excess work operations required to build the actual project, over and above the number needed for the represented project. Finding 27 shows the added, required hand excavating. Cf. Phillips' evidence in substantial support (R. 1666-9).

"Section" is defined as "a *representation*, picture or drawing, showing something, as a building, machine or geological formation as it would appear if it were cut by an intersecting plane and the portion between the observer and the cutting plane removed; sometimes, also the thing itself, if so treated and viewed." "Represent" is defined as "To bring before the mind; portray, whether by *language*, pictorial art, *or in some other way.*" Standard Dictionary (1941).

then or later, because of requirements insisted upon by defendant, or its failure to pay, or for differences between the work required and the original representations.

"Conferences were held on June 20th and July 1st. Defendant *again threatened* to 'take over the job' and demanded that plaintiff pour approximately 2,200 cubic yards of concrete in the next 15-day period, and *insisted that plaintiff go on with the work.*[3] Payments were still considerably in arrears. Plaintiff *was obliged by the situation to proceed regardless of the lack of justification of defendant's demands, and additional expense caused thereby"* (1,789 cubic yards *per month* represented orderly progress. No. 23, R. 1915).

5. Answer (R. 68) affirms that when Phillips "threatened, as it did," etc., that plaintiff "speeded up" the work. The conclusion is pleaded *that plaintiff* is thereby estopped; that it thereby waived fraud and ratified the April "contract." Proof of fraud and compulsion came even from Phillips' Chief Engineer (R. 1861, 1862), who naively testified: "I don't know whether you call it threatening. *I just told them.* Q. Twice on June 15 and June 30? A. That is right"—and he continued: that it was a true statement, that a simple order to the gate watchman would put plaintiff outside of Phillips' fence (R. 1862). Finding 5 (R. 1901) confirms his knowledge of the facts, when the "cross section" differences and an in-

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[3]The opinion says (R. 1992):

"The evidence shows that appellant, instead of abandoning the contract, *insisted always upon its performance."*

This is the one place where the opinion agrees with any part of any Finding. Cf. R. 1862. It overlooks Finding 33, R. 1921, which clearly establishes abandonment or breach of a construction contract, both under Missouri and general law. The opinion says

"it is difficult to attribute importance to (the) finding that the parties abandoned the contract or that the appellant breached it" (3). R. 1991.

Finding 33 expressly states that it is made *in the alternative,* that "even if it could be held that the 'form of contract' was or ever could have become a valid obligation, nevertheless, the evidence establishes that it was in fact abandoned by the parties." Cf. *Fuhler* v. *Gohman & Levine Const. Co.,* 346 Mo. 588, 142 S. W. 2d 482, l. c. 484, subd. 4.

voice therefor was presented to him and Engineer Hubbell, who supplied the "cross section." He exclaimed, *"Gus, if what you tell me is true, then we have no contract"* (R. 153, 176, 1811, 1812, 1820, 1858). However, he *"didn't put any importance to the matter,"* and Mr. Hubbell was never asked until after suit about what information he gave (R. 1858).

6. Phillips paid less than $15,000 when plaintiff had in excess of $150,000 in cash and commitments invested (No. 21, R. 1910). Over 100 concrete form carpenters were recruited from distant points because of the "speed up," but soon not even ten could keep busy (No. 23, R. 1915). *No independent Engineer was designated to prepare plans.* Phillips supplied them, but in peaks and valleys, for 10,735 cubic yards of concrete, of the 12,000 originally approximated (No. 23, R. 1915). An aggregate of 215 changes in about 500 plans were made after issue, although field orders to build accompanied the plans (No. 17, No. 23, R. 1909, 1915; R. 1848; 1629; Ex. 5, R. 271). Numerous "hold work for revision" orders increased plaintiff's costs. These destroyed orderly progress of the work for plaintiff,[4] while Phillips "made up its mind" about "the subject matter of the work to be done" (No. 16 to 18; R. 1906-1909). Some plans followed manufacturer's advice, obtained later when machinery was purchased (No. 9, R. 1904). The work ended November 14, 1939, instead of September 1st, or 15th, as represented. Phillips then ran out of plans and released plaintiff. Plaintiff sought its release before September (No. 23, R. 1916), but from early June Phillips exerted duress. A project of different *nature, conditions and unit sizes* was thus procured (No. 33, R. 1921). Large concrete units were built during the job and after it ended, by others. The April "contract" supplied no method to determine inclusions or exclusions. There *was no possible "meeting of minds" on "the subject matter of the work to be done,"* and *such Finding is made as a fact* (Nos. 16, 17, No. 9, R. 906, 904).

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[4]Phillips' Engineer Wise (R. 1635) explained:

Q. "Well, Phillips consulted its own convenience in ordering out the progress of the work to be done?"

A. *"It was our job and Rau was working for us."*

(That attitude may be proper under a "cost plus" contract, which is the only type Phillips could have procured, if a true disclosure of the facts had been made.)

7. Differences between the work and the represented "program" *could not be determined* until completion, because of promises of plans for numerous large (and more profitable) items shortly to be issued (No. 25, R. 1917). The work completed averaged less than 3 instead of 19 cubic yards per concrete pour; less than 110 instead of 700 square feet per form set-up. The ratio of hand to machine excavating was 109:98 instead of 20:80. Completed unit sizes were smaller; the required methods differed. Additional expensive hand excavating was required. A total of 9,485 separate, additional work operations, with added hand excavating, all aggregating $88,-481.50 in value, directly resulted because of differences between the completed and the represented job (No. 23 to 27, R. 1915-1919). Exhibit 46 (R. 1467) details the value of additional work of $124,093.84, with overtime and admitted items excluded. The completed project required plaintiff to perform over six times the number of costly work operations, above the number correctly computed for the falsely depicted job (No. 26, R. 1919).[5]

8. Unnecessary overtime of $4,392.20 was ordered by Phillips, for its convenience, knowing of the added costs (No. 23, R. 1914). Nothing was paid therefor. Only $230.60 for overtime is included in Phillips' judgment consent (No. 1, R. 1898). $230.16 for fine grading, etc., caused by changes in plans (No. 28, R. 1919), and $152.98 for tooled edging, not shown on the plans, and ordered after Phillips was advised of the cost (No. 29, R. 1920), were allowed. All are outside of any express contract term. They *are not mentioned* on appeal, but *are reversed*. Relief was denied on prayer for rehearing (R. 2001).

9. Trial was of the simple *quantum meruit* issues in *assumpsit*. The trial court twice stated the issues, at R. 89, and in Memorandum Opinion (R. 1871). After *profert and oyer*, Phillips asked *terminer* of the April Missouri contract, and of a June 17, 1939, Texas memorandum, with 19 price paragraphs, but none of its paragraphs were directly in issue. That memorandum was written by Phillips' Chief Engineer and was signed at the mid-June meetings where

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[5]Cf. R. 265-9; Ex. 7, 297; Ex. 5, 271; 369-372; Ex. 11, Vol. 4; 793-829; 1449-1458; Ex. 16, 831; Ex. 20, 835; Ex. 21, 851; Ex. 22, 855.

the threats were made. It was invalid for duress and for the fraudulent promises made and not intended to be performed (Findings 21 to 25, R. 1910). Plaintiff asked no determination of its invalidity but used it, with other evidence, to show reasonable value of concrete forms and panels, which plaintiff built but never got to use (and did not get paid for), because of Phillips' 215 changes in plans. Finding 22 (R. 1911) allowed $35,597.16 therefor. See Questions Presented No. 5, *infra*, p. 15. Because Phillips asserted a defense under June Paragraph 4 (which was denied by Finding 22), it exactly followed the common law rules designed to require express contracts (when fully performed on one side) to be filed in court, so that *the determination of their validity, as a defense, could be governed by equitable principles at law,* without resorting to the competing Chancery Courts. The determination, made at Phillips' request, was: *Neither April nor June "contracts" are valid as a defense* (Conclusions denied, R. 1931; given, R. 1922). The composite case reversed (according to the opinion) is *quantum meruit* and for *damages for fraud and deceit, damages for* breach and *damages* for abandonment (R. 1988). Phillips, and the opinion, assert the June "contract" supplemented that of April. If so, it supplemented a nullity and a fraud and was stillborn. Its obvious and only purpose was to fix a "price ceiling" for "extra" and "additional" work required, for which Phillips was clearly liable. The "extra work" (particularly the $35,597.16 allowed by Finding 22) was payable 30 days after the job ended (Par. 35, R. 15). The alleged defense was designed in June. No records of form losses were produced by Phillips. It preferred concealment. Assuming validity on appeal, of the June "contract" without discussion, was simple, after life was conferred on the void April "contract." Discovery of "accord and satisfaction," "compromise and settlement" and "accounts stated" (although never pleaded below, and despite their denial by Phillips' own evidence) also were no problem. Long after trial, at oral arguments carefully heard in the trial court (R. 1878), before finally filing his indicated Findings, for the first time Phillips then announced that it had "dug up a case" (R. 1391) and asked for a Conclusion, that, if the April and June contracts were invalid, its "extra work orders" were binding contracts. These were never used to order "extra work," as specified in April Contract, Paragraph 5 (R. 6), how-

ever (R. 1659-62). Phillips prepared them for everything, after the work was done. That Conclusion was denied (R. 1932). Finding 32 (R. 1921) determined that the "extra work orders" were nothing but field memoranda, and ends with a Conclusion of Law, reading, *"There is nothing in the entire evidence on which a waiver, ratification or an estoppel by plaintiff may be predicated."* Finding 25 (R. 1917) determined *that fraud was not discovered until completion.* At R. 2032, it was carefully pointed out that the trial court conducted his own examination to determine the facts, that the hand excavating, done early in the job, was at Phillips' request, to avoid damage to concealed pipes. Phillips paid for that until the June memorandum was signed; thereafter no payment was made but the same work was compelled.

10. That plaintiff derived no benefit from the June agreement, or that any April "unit price" was increased, is denied by Phillips' Chief Engineer (R. 1809, 1814), who discusses the items of *"extra work"* or *"additional work,"* for which he set a "price ceiling" in the June memorandum. That there was no accord or satisfaction from checks or "statements of estimates" (a mere list of "extra work orders") is denied by the Record, Findings and Phillips' evidence. Stipulation (R. 1089) shows that the only endorsement on checks was: "In full settlement of the within account." R. 1090-91 is a copy of Phillips' financial records, and *lists every check.* It definitely establishes *there was never a check issued by Phillips,* for $2,010.23, with an accompanying statement, or for any like amount (cf. Opinion, R. 1994). Phillips' Exhibit 45 (R. 1366; its Exhibit 40, R. 1244); its Chief Engineer (R. 1820-22, 1937); and its Engineer Hubbell (R. 205-207) all deny the conclusions on appeal (R. 1993), that a settlement of the claims in suit followed the acceptance of any check. The two checks received after completion are shown in the above letters and records. They were paid for Phillips' benefit, to discharge lienable bills at its request, and a list thereof was furnished as agreed (R. 1820, 1837, 205). The express agreement is established by Phillips' evidence and by Finding 5 (R. 1900), that *every claim in suit would remain open, without prejudice, until a meeting with Phillips' Mr. Riney, at Bartlesville, which was held December 20, 1939,* or exactly seventeen days after receipt of the last check accepted. Plaintiff's men went there at their own expense at Phillips' request. The

only check ever offered as final settlement was for $1,-787.51, dated December 21, 1939, which was promptly returned (Exhibit 4, R. 1244). Finding 1, R. 1899, established from the evidence, for the first time, just what items were included in Phillips' judgment consent. It also finds that the original answer admitted $2,108.53 and not $2,010.23. April "contract," Paragraph 35 (R. 15), specifies that all payments, except the final one, are only "*estimated to be due.*" Final payment was due 30 days after completion (or December 14th) and then only after Phillips' Engineer certified to the whole value of all "contract" and "extra work," which has not yet been done. The last check accepted was December 3, 1939.

11. Finding 1 (R. 1898) determined that jurisdiction was based on diversity of citizenship. There is no intimation of that on appeal, nor is there anything to indicate a Missouri contract for Texas work, induced by false representations made in Oklahoma and Texas.

12. These matters were urged on original hearing and in petition for rehearing (R. 2030, 2040). It was overruled, without comment and without correction of plain errors of fact. The opinion is not only without record confirmation but it is expressly denied by Phillips' evidence and financial records, as stated. These and the many anomalies presented under "Reasons Relied Upon" (p. 18) seem to differ with the accepted course of recognized judicial proceedings in United States Courts.

13. Nothing was overlooked, for Phillips. The trial answer of November 13, 1940 (R. 69), was to the complaint filed January 2, 1940. Under Missouri law that was demand, to start interest. By Texas law, interest started January 1, 1940. Answer, Paragraph 23 (R. 66), admitted $2,010.23 was due and consented to such judgment, with costs. The directions on reversal require judgment entry of $2,010.23, but on filing the mandate. Interest was disallowed on even that. Phillips did not bring its falsely represented conditions, integral to the contract subject matter, into existence. It had no contract with mutuality of obligation to enforce. Fraud and duress unjustly enriched it and it obtained a further bonus in the high premium paid by plaintiff, in waiving damages for delay (final Paragraph Finding 23, R. 1916) and damages for fraud. That was done to insure recovery, under the

equitable rules governing assumpsit, of bare reasonable value of work done (without recovery of other losses sustained). Petitioner was denied all. Phillips' conduct was rewarded on appeal, by grant of more rights than any contract ever reserved. Different facts and a different action were assumed, for Phillips. Duress findings were plainly ignored. Any reference thereto rendered reversal impossible. Opinion (2) (R. 1989) says: "In *the view we take* of this case, it is unnecessary to discuss the findings * * * that appellant was guilty of fraud in inducing the execution and performance of the contract." What else is established by the record, answer and Findings?

STATEMENT OF THE BASIS OF JURISDICTION.

(a) U. S. C., Title 28, §§347 (a) and 377, and Rule 38 of this Court, are the basis of jurisdiction.

(b) The questions of substance and of public concern which are of special importance in the public interests are stated in the "Reasons Relied On For Allowance of the Writ," p. 18 herein. These cases sustain jurisdiction:

Layne & Bowler Co. v. *Western Well Works*, 261 U. S. 387, 392, 67 L. Ed. 712.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 163, 67 L. Ed. 922.

(c) The decision on appeal contravenes Rule 52 (a), Federal Rules of Civil Procedure, and U. S. C., Title 28, §§773 and 875, and these cases, which sustain jurisdiction:

State Farm Mutual Auto Ins. Co. v. *Coughran*, 303 U. S. 485, 487, 82 L. Ed. 970, 972, subd. 1.

Deputy v. *DuPont*, 308 U. S. 488, 497, 84 L. Ed. 416, 423, subd. 6.

Law v. *U. S.*, 266 U. S. 494, 496, 69 L. Ed. 401, 402.

The error of the decision in failing to declare and apply the controlling state law and in denying equal protection of laws (see *infra* p. 22) is shown by these decisions which also sustain jurisdiction:

Griffin v. *McCoach*, 313 U. S. 498, 85 L. Ed. 1481.

Klaxon v. *Stentor Elect. Mfg. Co.*, 313 U. S. 487, 85 L. Ed. 1477, 1480.

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169, 85 L. Ed. 109.

Pecheur Lozenge Co. v. *Nat. Candy Co.*, 315 U. S. 666, 86 L. Ed. (adv.) 739.

(d) The substantive rights denied by refusal to apply the equitable rules governing an assumpsit action contravene:

Guerini Stone Co. v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 343, 63 L. Ed. 275, 284.

Stone v. *White*, 301 U. S. 532, 534, 81 L. Ed. 1265, 1267.

Phillips & Colby Const. Co. v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341.

(e) The decision reversing the judgment of the District Court was filed August 19, 1942 (R. 1994). It is reported, 130 F. 2d 499, and appears, R. 1987. Petition for Rehearing (R. 1995), filed September 2, 1942 (R. 2042), was overruled, without comment, on September 24, 1942 (R. 2043). Order staying mandate for thirty days was filed October 2, 1942 (R. 2044).

QUESTIONS PRESENTED FOR DECISION.

1. Was it error to reverse a contractor's judgment of $140,582.53, entered as the value of concrete construction work performed under compulsion, above the requirements of a project falsely depicted and which induced a "unit price" construction contract?

2. Are these rulings, made in support of reversal, erroneous, to-wit:

(a) Under Missouri law it is not fraud, but only an "expression of opinion or expectation," before unit plans are drawn, to supply a false "cross section" and false engineering information, through an authorized engineer acting in the scope of his employment, to induce a "unit price" construction contract?

(b) A "unit price" construction contract is not abandoned nor breached, nor is there any recourse, where the

contractor is required by compulsion to erect a project of different *nature, conditions and unit sizes* from the represented project, and costing nearly $125,000 more to build?

(c) A "unit price" contract made before unit plans are drawn, for construction of approximately 12,000 cubic yards of concrete, does not require certainty of engineering "job cost factors"?

(d) If there was any original contract uncertainty, it vanished seriatim, with the delivery of plans as issued by the owner, where no independent Engineer was designated to draw them. The owner had the right to supply plans, with 215 changes made after the first issue of 500 plans, for a project contrary to prior, definite representations of the *nature, conditions and unit sizes* of construction, and a judgment allowing the exact difference in value is "not justified" and must be reversed?

(e) The printed contract of Phillips Petroleum Company, providing that it shall not be liable for "any quantities expressly stated or implied *by any of its representatives*" (R. 7, Par. 8), released all liability for the reasonable value of all construction work performed under compulsion, in excess of the requirements of a "unit price" contract induced by false engineering information and a "cross section," *supplied* (before unit plans were drawn) *by Phillips' Engineer, acting in the scope of his employment* (Answer, Par. 12, R. 63). Although delivered in Missouri by agreement (Finding 13, R. 1909), it should be enforced by reversal, with no mention of the Missouri public policy which condemns such contracts?

(f) Mutuality of obligation inheres in a "unit price" contract specifying that the owner may terminate it and all liability thereunder, at will, by paying the value of completed work in place, but without paying for uncompleted work, or for the cost of moving men, materials and equipment in, and then out again, upon such termination?

(g) Performance, under compulsion, of an entirely different and more costly project than that originally represented to induce a "unit price" contract is performance of the contract and supplies any original want of mutuality, if it was lacking at its inception?

3. If error, *are such determinations in the public interests;* was Phillips Petroleum Company thereby granted

the fruits of authorized fraud and deceit; do they endanger the Construction Industry and tend to delay construction vital to the public interests in the present emergency, and are the high principles of the United States Courts truly reflected in the public interests and in the interests of the Judiciary?

(a) Is it in the public interests that District Courts of the Eighth Circuit, in following the decision, will be bound to (1) grant the fruits of fraud to those who so induce "unit price" construction contracts (2) follow the rule of *Roosevelt* v. *Mo. State Life Ins. Co.*, in fraud cases governed by Missouri law (3) enforce contracts relieving in advance from all liability for authorized fraud and (4) rule that it is not fraud, but merely an expression of opinion or expectation, to wilfully misrepresent unit sizes and "job cost factors" to induce construction contracts?

4. Did the decision err and does it conflict with rulings of this Court, in failing to consider or to determine whether there was any substantial evidence to support trial Findings?

(a) Did it err in ignoring supported trial Findings, without consideration of, or comment thereon?

(b) Did it err in either respect, or deny equal protection of laws, when the same Court, at the same Term, declared for other litigants, that trial Findings are presumptively correct and, if supported by substantial evidence, will bind determination on appeal?

(c) Did it err in a diversity of citizenship case, in failing to declare or apply the controlling law, or did it avoid that error by ignoring the basis of jurisdiction and ignoring that the contract enforced by reversal was for Texas work but was delivered by agreement in Missouri and was induced by deceit accomplished in Oklahoma and Texas?

(d) Did it err in failing to apply the controlling declared Missouri law on fraud and in citing and following the former Circuit rule declared before *Erie R. R.* v. *Tompkins*, when the same Court, at the same Term, declared for other litigants, that the former Circuit doctrine of *Roosevelt* v. *Mo. State Life Ins. Co.* may no longer be assumed to apply in any case governed by the Missouri law on fraud? (Page 23 herein.)

(e) Was equal protection of laws thereby denied?

(f) Did it err in failing to follow the Missouri law declared in the first Missouri case cited in the opinion (R. 1993), when Phillips' own evidence indisputably established that every claim in suit was left open, without prejudice, until reviewed at a meeting held seventeen days after the last check was accepted. and that by agreement the checks were delivered in Missouri? (Page 9 herein.)

(g) Did it err in the same conclusions, when Paragraph 35 (R. 15) of the "contract" which Phillips pleaded as a defense, specified that all payments, except the final payment, are only "estimated to be due" and that the final payment will be due not earlier than 30 days after completion, and the last accepted check was received 11 days prior to the expiration of that time?

(h) Was there error in the same rulings, when the questions were never in issue below, and "accounts stated," "release," "compromise" or "accord and satisfaction" were not pleaded by answer?

5. The decision (R. 1992) reversed $35,597.16, allowed "For loss of (concrete) forms, form panels and reuse, totalling 355,971.64 (square) feet, at 10c per foot, per Finding 22" (R. 1911), with the statement that the allowance was "not justified by anything in the conduct of the parties or in the words of their agreement" to pay ten cents per foot under Paragraph 4 of memorandum of June 17 (R. 18) "For changes in forms caused by a change in the plans." Supported Findings 22 (R. 1911); No. 31 (R. 1920); No. 20 and No. 21 (R. 1921); and No. 17 (R. 1908), and denial of requested Conclusions of Law (R. 1931) established these facts:

(a) The agreement was invalid for fraud and duress. The allowance was made as reasonable value under implied contract. The trial court, under the law of the forum, found also that the language was ambiguous and, after hearing the evidence of the parties who made it, arrived at the identical results. whether the agreement was valid or invalid (Finding 22). The above Findings established:

(b) 15.4c per square foot "contact area" was specified in the April "contract" (R. 14) but that sum was

paid only for the exact area of concrete forms which touched and held erected concrete. Contract, Paragraph 5 (R. 6), provides for changes in plans, but requires agreement for the price and extent of work caused thereby. Nothing whatever was paid for concrete forms built ready for use, nor for the form panels which were used at Phillips' direction and which were fabricated to be used on one structure, shown by issued plans, and were designed to be successively moved and re-used to pour the concrete for similar structures, likewise shown by issued plans. The area of concrete forms and panels, mentioned above, was completely lost for any use after the expense of building or fabricating was incurred, because of the 215 changes made in the plans by Phillips, after their delivery, with orders to erect.

(c) Phillips paid nothing whatever for the $35,597.16 loss resulting from the useless fabrication of costly panels nor for erecting unused concrete forms. $1,165.67 was included in its judgment consent, for a few items, based on memory alone. Plaintiff's proof was by actual field records. Phillips' Engineers were ordered to keep such records. None were produced. Phillips took advantage of the lower rate for forms wrecked by its trucks, etc., although Finding 22 states that Phillips' own evidence indicated that it should pay 15.4c for many items (Finding 22, R. 1911; No. 31, R. 1920; No. 17, R. 1909; No. 1, R. 1898; Ex. 5, R. 295; Phillips' Ex., R. 1380, 1381; Phillips' Evidence, R. 1658-9).

Phillips' letters (R. 1381, 1382) referred to therein confirm Finding 22 (R. 1911). The exact amount computed in these letters is included in the judgment consent. Finding 1 (R. 1898). After trial, Phillips re-confirmed the admissions made by its request for Conclusion VIII (R. 1932). These facts were clearly presented (R. 2002) without result. Was the reversal error?

6. Was it error to overrule petition for rehearing, without comment and without correction, when (R. 2009) attention was clearly invited that even under the erroneous ruling here made, Finding 22 established that Exhibit 5 (R. 295) was correct and on the face of that exhibit petitioner was entitled to a minimum of $5,341.95 not paid for concrete forms erected ready for use, but which could not be used because of changed plans?

7. Was an aggregate of $4,775.34 properly reversed without any comment or reference thereto, where trial Findings established that the allowance was for overtime specially ordered, without necessity and for the convenience of defendant, with knowledge of the added costs, and for items of additional work, all outside of the terms of any express contract? (R. 2001.)

8. Was it error to rule:

(a) That fraud was known early in the work from discovery of a difference in ratio of hand to machine excavation?

(b) That a "supplemental agreement" "substantially increased the contractor's compensation" after discovery of fraud and effected a waiver of fraud, or compromise thereof?

when the decision ignored trial Findings, which established that differences between the work and "cross section" representations were not discoverable until completion, and that there was nothing in the entire evidence on which to predicate a waiver, ratification or estoppel of plaintiff, or to deny it the reasonable value of additional work performed under compulsion. Defendant's Conclusions requested in an assumpsit case, to declare the alleged "supplemental agreement" valid and that it was not obtained by fraud, were denied. Findings determined facts which establish that the "agreement" was invalid for both fraud and duress. Compromise was not pleaded nor in issue below. The trial Court conducted its own examination to determine that the "hand excavating" was performed at Phillips' request on oral agreement to pay the additional cost for locating concealed pipes to avoid damage by excavating machinery. The alleged "supplemental agreement" confirmed the prior, oral agreement but after compulsion was exerted the same work was thereafter required without compensation? (See Page 7 herein.)

9. Was it error to reverse a composite *quantum meruit* case and an action for damages for fraud and deceit; for breach and for abandonment, when only simple assumpsit issues were pleaded and tried? (Page 7 herein.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The decision on appeal fundamentally erred in basic questions of substance and of special importance in the permanent public interests and in the public interests particularly affected in the present emergency.

The opinion contravenes good morals, public policy and Engineering ethics. It rewards the authorized deceit of Phillips Petroleum Company, but denies the simple arithmetic and common sense clearly demonstrated in trial Findings.

The errors gravely affect the Construction Industry and the Engineering Profession. Every concept of "unit price" construction contracts is nullified. That important type of engineering contract is designed to avoid delay to wait for detailed plans.

The Construction Industry is endangered by the approval of fraud, where it may readily be perpetrated, as the facts here illustrate. The Engineering Profession is bewildered by the decision.

The District Courts of the Eighth Circuit are obliged to grant others the fruits of deceit in inducing "unit price" construction contracts.

The decision erred in ignoring lawful trial Findings and in refusing to apply the controlling Missouri law and the same law declared at the same Term, to govern other litigants. Justice and equal protection of laws was thereby denied, contrary to the accepted course of judicial proceedings and to the law repeatedly declared here.

There s a firm faith in this Court to decide the questions and to correct the basic errors made on appeal or, otherwise, the now vital Construction Industry would be paralyzed and an unfavorable reflection of the United States Courts would follow, contrary to the public interests and the interests of the Judicial System.

A.

Basic Errors on Appeal.

The fundamental errors on appeal are of the gravest concern in the Construction Industry. They astound the Engineering Profession.[6] By analogy, the ethics and arithmetic taught on appeal is: An owner may induce a unit price of $100 for erection of one 10 yard cube of concrete. It may, at the same price, thereafter require the contractor to dig the holes and pour the same amount of concrete to form the base of 300 separate highway markers. Under the supported Findings of Fact in the record, the decision on appeal determines:

1. There is no fraud in inducing a "unit price" construction contract, by knowingly supplying false information and a false engineering "cross-section," before plans are drawn. Such deceitful representations "if made and if false" are mere "expressions of opinion or expectation." Opinion (2) (R. 1989). Likewise, it is immaterial that the owner alone knew the true facts and could change the plans at will, where no independent Engineer or Architect was employed. Answer, Par. 12, R. 63, admits: that everything given, was with authority, but it was "not accurate and not intended to be accurate."

2. "Unit price" construction contracts require no certainty of "job cost factors." Any original uncertainty is removed *seriatim*, as plans are received during progress of the work. The plans may depict a project of any *nature, conditions or unit sizes*, re-

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[6]Cf. *Picard* v. *United Aircraft Co.*, 128 F. 2d l. c. 641, saying "it is intolerable that the public interests should be at the mercy of the haphazard scientific information of judges." After stating a difficulty to understand, *United Const. Co.* v. *City of St. Louis*, (Mo.) 69 S. W. 2d 647, subd. 9, says:

> "The contract deals with an engineering proposition, abounds in technical and scientific terms, and was to be carried out by men learned in that line of work. An expert in that line of work was best fitted to interpret the contract and solve the controversies. * * *"

That "human society is not so organized that a dispute between A and B can be of no concern to anybody else" is stated in Note 7, l. c. 295, in *Aero Spark Plug Co.* v. *B. G. Corporation*, 130 F. 2d 290, 295.

gardless of prior representations. Opinion (1) (R. 1988).

3. Contracting in advance against all liability for authorized fraud is valid and properly enforced by reversal on appeal, without mention nor application of the governing Missouri public policy, which condemns such contract provisions. Opinion (2) (R. 1990).

4. There is mutuality in a "unit price" construction contract which may be terminated at will by the owner, upon paying the value of work completed according to specifications and in place, but without paying anything for moving in men, materials, machinery, sheds, field offices, shops, etc., and then moving them out again. Partially completed construction need not be paid for. Moreover, want of original mutuality is removed by building, under compulsion, an entirely different project, costing nearly $125,000 more (excluding overtime and undisputed items). That is performance, to make the contract binding, if it was wanting in mutuality or was too indefinite to be enforceable at its inception. Opinion (1) (R. 1989).

5. A "unit price" contract is not breached nor abandoned, nor is there any recourse for the contractor, who is required, under compulsion, to build a project of different *nature, conditions and unit sizes* and costing nearly $125,000 more than the originally depicted project (excluding overtime and undisputed items). Opinion (3) (R. 1991).

6. An aggregate of $4,775.34, allowed by trial Findings for overtime and additional work, required under compulsion and outside of any possible contract terms, may be reversed on appeal, without mention. Findings 23, 28, 29 (R. 1919; Rehearing, 2001).

The only interpretation of this decision in Engineering and Construction fields is that the United States Courts refuse to recognize as fraud the intentional, authorized misrepresentation of "job cost factors," where falsely made to induce "unit price" contracts. The inevitable disruption, with extensive litigation necessarily following, is disturbing in this vital Industry. That reflection of United States Courts is not in the public interests.

The generality of statement and failure to declare the law guiding the decision on appeal, may only be interpreted to mean that the doctrine erroneously announced, *is of universal application* throughout the United States and in every state. The importance of the rules of *Klaxon* v. *Stentor* and *Griffin* v. *McCoach, etc.* (cited but ignored on appeal, R. 1999), is here made manifest.

B.

The Engineering Purpose and Design of "Unit Price" Type of Contracts and Their Vital Importance Now.

The reversal destroys and denies realization of the basic engineering design of "unit price" contracts. That is the type reviewed. The type enforced defies description. The opinion (R. 1992) says that the right to change plans was reserved, but it says nothing of the coordinate provision (R. 6, Par. 5) requiring advance agreement *on the price and extent of work* so caused.

"Unit price" construction contracts (now, especially) are an important general engineering type, designed to avoid construction delay to wait for detailed plans. The *extent or total amount* of any classification of work, or *of the whole project*, may legitimately be changed, within reasonable limits. However, *the conditions, nature and unit sizes of a project, as represented to the contractor,* are the only "cost factors" available to compute "unit prices," particularly, where unit plans are not complete. *Those represented "cost factors"* may not be altered at will by the owner (as was done here), without a breach or an abandonment of a "unit price" contract, if it is possible to conceive an original "meeting of minds" thereon, or if fraud did not vitiate it. In this respect, this type closely resembles a "lump sum" contract.

Judicial consideration of the lawful Findings of an engineering-experienced trial court, would have made the errors impossible. The Findings demonstrate, by simple arithmetic, that the plans issued during construction, for 10,735 of an approximated total of 12,000 cubic yards of concrete, required a project of materially different *nature, conditions and unit sizes* from those falsely represented to induce the April "contract." Because of those vital differences, the record and Findings establish that plaintiff actually performed over 9,485 separate work operations and additional work valued at $88,481.50. *Exhibit*

46, R. 1467, details the totals of $124,093.84, for additional labor and material and itemizes each class of work and the entire project (excluding overtime and admitted items). Plaintiff was paid the exact sum it would have received without that expenditure, if Phillips brought the false program into reality.

The ratio of 10,735:12,000, for completed to approximated work, approaches *a reasonable change in the total extent or amount of the construction.* No damages for breach or abandonment therefor were claimed. The opinion, however, reverses such an action. No distinction was found between a change in *extent* of construction and changes made in the *nature, conditions and unit sizes* of the project despite the definite Findings which made that so very obvious.

The decision acts as a "stop order" for all projects if misrepresentation appears, no matter how vital they may be. Continuing the work, or any adjustment, despite or to endure duress, or an agreement to accept pay for hand trenching ordered to protect pipes from excavating machinery, effects a waiver or compromise, under the teachings here. That result also follows acceptance of money indisputably due, to pay lienable bills therefrom at Phillips' request, with a concurrent agreement that the controverted claims (later sued for) will remain open, until a subsequent conference. Such is an accord, if no satisfaction, but requires reversal, if this decision rightly rules.

C.

The Denial of Equal Protection of Laws and Other Errors on Appeal.

The denial of equal justice and equal protection of laws destroys a private interest, but that is of public concern. Implicit public faith in equality of justice without denial (inadvertently or otherwise) is essential for orderly government. Petitioner filed its complaint, firm in that faith. Indisputable rights, existing even under the errors made, were denied, without comment, on prayer for rehearing (R. 1998-2001).

The same Court, however, *at the same Term,* declared and applied for other litigants:

1. That trial findings are presumptively correct, and, if supported by substantial evidence, bind the determination on appeal. *American Insurance Co.* v. *Scheufler,* 129 F. 2d 143. *Chicago Mill & Lumber Co.* v. *Tully,* 130 F. 2d 268, 274, 275.

2. *Roosevelt* v. *Mo. State Life Ins. Co.* is the first case cited in Opinion (2), R. 1990, in support of its fraud conclusions. With the same presiding Judge as here, it was declared in *Dubinsky* v. *Lortz,* 129 F. 2d 669, 673, that the *Roosevelt case Circuit fraud doctrine may not be assumed to apply* in fraud cases governed by Missouri law.

The governing Missouri "waiver of fraud" rule was printed at length, in Petition for Rehearing (R. 2074), from a case cited in, but misapplied by, the opinion. The governing rule of fraud was also printed (R. 2025). That case is not cited in the opinion and the contrary statement at R. 2027 is error. The Missouri law was ignored.

The opinion (1) (R. 1988) errs in presuming that a Petroleum Company "can do no wrong." History denies that. *United States* v. *McMullen,* cited in support, is the only mentioned construction case, where an *independent* architect or engineer *was not designated* to prepare the plans. The presumptions attending Sovereignty or Government Departmental Engineers are an incongruity here.[8] Correction of specific fact errors, directly contrary to the record (R. 2030, 2037, 2039), were denied. The many anomalies are inconsistent with the accepted course of judicial proceedings. The existence of the power of review vested in this Court usually suffices to render its frequent exercise unnecessary. It failed here.

The decision and opinion erred in each and every respect stated, and erred (a) in failing to declare and apply the controlling state law in a diversity of citizenship case; (b) in failing to adjudicate the only questions presented, to-wit: are the trial Findings supported by substantial evidence and do they sustain the judgment (c)

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[8]Cf. Secs. 216-218; 340-341. Engr. & Arch. Juris., J. C. Wait, M.C.E. Cornell; LL.B. Harvard, 1st Ed.; 17 C. J. S. 772, N. 51, 55; 9 C. J. 695, N. 32; 697, N. 64, 68, 69.

in ignoring Findings entirely, (d) in contravening the controlling law in each and every ruling made and by the determination (e) in reversing a composite damage action for fraud and deceit, breach and abandonment, when only simple assumpsit issues were presented by the record and (f) in reversing Finding 22 under the facts specified in questions presented, No. 5.

Prayer for Writ.

Your petitioner prays that a Writ of Certiorari issue under seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of *Phillips Petroleum Company, a Corporation, Appellant,* v. *Rau Construction Company, a Corporation, Appellee,* No. 12138, to the end that this cause may be reviewed and determined by this Court as provided for by law; and that the findings and decision of said Circuit Court, to which petitioner has objected, be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

Rau Construction Company,
a corporation,
Petitioner,

By MAURICE J. O'SULLIVAN,
700 Gloyd Building,
Kansas City, Missouri,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion directing reversal is reported 130 F. 2d 499, and appears at R. 1987.

II.

JURISDICTION.

The jurisdictional statement, p. 11 herein, is adopted by reference.

III.

STATEMENT OF THE CASE.

The "Summary and Statement of the Matters Involved," pages 1 to 11 herein, is adopted by reference.

IV.

SPECIFICATIONS OF ERROR.

The decision and opinion on appeal erred in each and every respect stated in "Reasons Relied on for Allowance of the Writ," pages 18 to 24 herein, which, for brevity, are adopted by reference as fully as if here printed at length.

V.

SUMMARY OF ARGUMENT.

1. Trial Findings were denied a judicial review. The governing law was not applied in a diversity of citizenship case.

2. Denial of the equitable rules governing assumpsit contravenes decisions of this Court.

3. Duress of property was established under Missouri and Texas law.

4. Deceit in matters solely known to one party is fraud under Missouri law, though opinions, a state of mind or expectations are stated.

5. Contracts relieving liability for fraud in advance are void under Missouri law.

6. Fraud avoids contracts which would not have been made if it was not employed.

7. There was no waiver of fraud, compromise or accord and no estoppel denied recovery of reasonable value.

8. There was either a breach or abandonment of contract. Either, or fraud, duress, uncertainty of subject matter or want of mutuality denied the "contract" as a defense, in an assumpsit action.

9. Certainty of subject matter of contracts is required under Missouri law. The minds of the parties must meet on the same thing, in the same sense, at the same time, or there is no valid contract.

10. Mutuality of obligation does not precede the existence of represented conditions, which are integral to the subject matter of a contract.

11. There was no mutuality in the contract. Performance under compulsion of construction work of different *nature, conditions and unit sizes* was not performance of the falsely represented project.

12. The invalid agreement to pay for changes in concrete forms caused by a change in the plans was not properly construed nor rightfully enforced on appeal.

ARGUMENT.

1. The opinion erred in failing to consider or to judicially review lawful trial Findings and (b) equal protection of laws was denied by failing to declare or apply the governing state law in a diversity of citizenship case. Cases cited in Statement of Jurisdiction, p. 11, and the cases decided by the same Court at the same Term, cited p. 11 herein, are adopted by reference.

2. The denial, on appeal, of the equitable rules governing assumpsit, deprived Petitioner of substantive rights.

Petitioner paid a high premium, for which Phillips benefited, when it waived damages for delay (Finding 23, R. 1916) and damages for fraud, and sued only for the bare value of work performed, to assure mere certain recovery in assumpsit. That error contravenes the decisions of this Court, which also support the right of affirmance.

Guerini Stone Co. v. *P. J. Carlin Const. Co.*, 248 U. S. 334, 343, 63 L. Ed. 275, 284. *Stone* v. *White*, 301 U. S. 532, 534, 81 L. Ed. 1265, 1267. *Phillips & Colby Construction Co.* v. *Seymour*, 91 U. S. 646, 23 L. Ed. 341. The action is equally recognized in Missouri and Texas. 84 A. L. R. 946, and a review of common law authorities in 95 A. L. R. 990. *Gillioz* v. *State Highway Commission*, 153 S. W. 2d 18, 22, Subds. 3, 4 (Mo. Sup.).

3. That Findings 20 and 24 established duress of property, under both Texas and Missouri law, is established by:

Brown v. *Worthington*, 142 S. W. 1082, l. c. 1084, Subds. 1, 2, 162 Mo. App. 508.

Goodrum v. *State*, 158 S. W. 2d 81, l. c. 85, Subds. 1-5 (Tex.), a construction case.

Coercion by economic pressure is recognized here in:

United States v. *Butler*, 297 U. S. 1, l. c. 71, 80 L. Ed. 477, l. c. 490, and in

United States v. *Bethlehem Steel Corp.*, 315 U. S. 289, 86 L. Ed. (Adv.) 521, l. c. 540-543.

The doctrine discussed in Mr. Justice Frankfurter's dissenting opinion in that case is recognized by the majority, although held inapplicable to the United States under the facts.

That the question is one of mixed law and fact to be determined by the court is held in *Schaefer* v. *Fulton Iron Works*, 158 S. W. 2d 452, l. c. 455, Subds. 1-3 (Mo. App.).

4. Controlling Missouri cases rule that false representations of fact solely within the knowledge of one party, although relating to a state of mind, an existing

purpose or to opinions or expectations, are fraud. These cases are ignored by the opinion:

Metropolitan Paving Co. v. *Brown-Crummer Inv. Co.*, 274 S. W. 815, 309 Mo. 638 (*En Banc*) (excerpt printed at length, R. 2025, 2026).

Collins v. *Lindsay*, 25 S. W. 2d 84, l. c. 90 (Mo. Sup.).

Luikart v. *Miller*, 48 S. W. 2d 867, l. c. 868, 869 (Mo. Sup.), which also rules that an evil intent may be implied from a reckless disregard of another's interests.

Judd v. *Walker*, 114 S. W. 979, Subds. 5-6, 215 Mo. 312.

National Theatre Supply Co. v. *Rigney*, 130 S. W. 2d 258 (Mo. App.).

5. Like Missouri cases rule that contract provisions purporting to relieve from liability in advance for authorized fraud are invalid and against public policy:

Rabenau v. *Harrell*, 278 Mo. 247, 213 S. W. 92, l. c. 93, 94, Subd. 7.

Rice v. *Lammers*, 65 S. W. 2d 151, Subds. 3-5 (Mo. App.).

Horwitz v. *Schaper*, 119 S. W. 2d 474, l. c. 480, 482 (Mo. App.).

Progressive Finance Co. v. *Stempel*, 95 S. W. 2d 834, 836 (Mo. App.), Subds. 4-6.

6. Like cases declaring that fraud avoids all contracts where it is shown that if it had not been employed, the contract would not have been made, are:

Taggart v. *School District*, 96 S. W. 2d 335, 337, 339 Mo. 223.

Armstrong v. *Winfrey*, 61 Mo. 354, 357.

7. That there was no waiver of fraud or compromise growing out of the June memorandum is declared in *State ex rel. Cary* v. *Trimble*, 43 S. W. 2d 1050, l. c. 1054. At Record 2035 an excerpt from this case is printed at length, from which it clearly appears plaintiff did not even "receive a drink of cold water" by reason of the June memorandum. See also *Osler* v. *Joplin Life Ins. Co.*, (Mo.) 164 S. W. 2d 295, Subd. 7. That there was no accord by receipt of checks for amounts concededly due

is held by a long line of Missouri cases, cited in Annotation 112 A. L. R. 1224, 1236, 1238, 1239, 1240. Texas and Oklahoma cases cited therein announce the same rule. The first Missouri case cited in Opinion (R. 1993) rules that there is no accord where claims are left open by agreement, but it was not followed on appeal.

8. That there was either a breach or abandonment of the "contract" is clearly established by the controlling cases. *Spitscaufsky* v. *State Highway Commission,* (Mo. Sup.) 159 S. W. 2d 647, 651, Subds. 2, 4, rules that it is a breach of the implied covenants of any construction contract to interfere with orderly progress of the work by failing to supply plans, etc. Material changes or capricious conduct are held to support a *quantum meruit* claim, l. c. 653, 657. *Fuhler* v. *Gohman & Levine Const. Co.,* 142 S. W. 2d 482, l. c. 484, Subds. 1, 2, rules that substantial deviations effect an abandonment of a construction contract.

9. That certainty of the subject matter of a contract is requisite for its validity under Missouri law is declared in: *State ex rel.* v. *Hughes,* 152 S. W. 2d 193, l. c. 196, Col. 1, and Subds. 4-7, l. c. 198 (Mo. Sup.); *McClintock* v. *Skelly Oil Co.,* 114 S. W. 2d 181, l. c. 189, Subds. 6-12, 232 Mo. App. 1204; *Wright* v. *Fuel Oil Co.,* 114 S. W. 2d 959, l. c. 961, 962, 342 Mo. 173; *Rexford* v. *Philippi,* 84 S. W. 2d 628, l. c. 631, Subds. 3, 4, 337 Mo. 389.

That innocent misrepresentations will defeat a meeting of minds is declared in 17 C. J. S. 502, Sec. 147.

That a contract void for uncertainty of subject matter is not validated by part performance or payment is declared in *Jesse* v. *Roloff,* 74 S. W. 2d 890, l. c. 893 (Mo. App.), and in the Missouri cases cited in 17 C. J. S. 762, Sec. 325, n. 37; page 366, n. 78; page 367, n. 92; page 369, n. 1; page 455, n. 85.

10. Cases declaring that where the subject matter of a contract is not ascertainable at its inception, an undertaking that it shall possess certain qualities when ascertained is a condition, the performance of which is precedent to any obligation thereunder, are: *Pope* v. *Allis,* 115 U. S. 363, l. c. 371, 29 L. Ed. 393, l. c. 398; *Redlands Orange G. Assn.* v. *Gorman,* 161 Mo. 203, 61 S. W. 820, l. c. 821, 2d Col.; *Fitzgerald* v. *Barker,* 85 Mo. 13, l. c. 22;

Dale v. *Pierson-Brewen*, 142 S. W. 745, l. c. 747, 160 Mo. App. 314; *Grigsby* v. *Stapleton*, 94 Mo. 423, 7 S. W. 421, 423.

11. That there was no mutuality of obligation in the contract is held in *Spitscaufsky* v. *State Highway Commission*, 159 S. W. 2d 647, 654, subd. 5, 656, subds. 10, 12, and *John P. Mills* v. *Bell*, 37 S. W. 2d 680, l. c. 684 (Mo. App.). That performance of a project of different nature, conditions and unit sizes did not supply mutuality is held in *DeLange* v. *Ogden*, (Tex.) 106 S. W. 2d 385, 391, Subd. 10.

12. The decision on appeal erred in reversing $35,597.18, allowed on implied contract for loss of use and payment for concrete forms and form panels, caused by changes made in the plans. The trial court (although the June memorandum was invalid for fraud and duress), properly construed the language and arrived at the same result, whether it was valid or invalid. He properly followed the *lex fori*. *Wentzel* v. *Lake Lotawana Dev. Co.*, 48 S. W. 2d 185, Subds. 4, 12, to 15 and 33.

Conclusion.

It is respectfully submitted that the questions of substance and of grave importance in the public interests, with the inexplicable denial of lawful rights, contrary to the accepted course of judicial proceedings, demand the intervention of this court, despite its recognized heavy burdens.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503

RAU CONSTRUCTION COMPANY, A CORPORATION, PETITIONER,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

H. D. EMERY,
RAYBURN L. FOSTER,
of Bartlesville, Oklahoma,
H. H. BOOTH,
of Kansas City, Missouri,
Counsel for Respondent.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 130 F. 2d 499.

STATEMENT OF THE CASE.

It is respectfully submitted that the petition should be denied:

(1) Because no question of general importance is involved;

(2) Because the decision of the Circuit Court of Appeals is in accord with settled law and is not in conflict with the decision of any other Circuit Court of Appeals; and

(3) Because Petitioner has failed to comply with Rule 38, paragraph 2, of this court.

Petitioner's assertion of a question of "special importance in the permanent public interests," and the contravention of "good morals, public policy and engineering ethics," that the "errors gravely affect the construction industry and the engineering profession," that "the construction industry is endangered by the approval of fraud," and other similar vague assertions (Petition p. 18), are wholly without support in the record.

The case involves contractual rights between two corporations; nothing more.

Succinctly stated, the District Court held that Petitioner was permitted to contract to do specified work at specified prices, perform the work and receive pay in accordance with the contract at periodic settlements, and, when the work was completed and the last check tendered, then for the first time assert that there was no contract and that payment for all of the work should be upon *quantum meruit*. The Circuit Court of Appeals held the contrary, and further, that there was a valid and binding contract.

It is apparent that the decision involves no question of public importance.

That the decision is in accord with settled law, including the law of Missouri, is abundantly shown by the opinion itself and the authorities cited in support of each point decided.

Counsel for Respondent believe that they can best aid the Court by supplying what Petitioner has omitted, namely, a concise statement of the case.

The essential facts in chronological order are as follows: Respondent, Phillips Company, has two plants near Borger, Texas, located about one mile apart. One is the Borger Refinery where crude oil is refined. The other plant is the Central Treater, which by chemical treatment produces natural gasoline of various grades, liquefied gases and pure hydrocarbons. In the spring of 1939, Phillips Company planned an extension of the Borger Refinery and a program of development at the Central Treater of a chemical process (polymerization) used in the manufacture of 100 octane gasoline for use in aviation.

One Gus Rau of Kansas City, Missouri, individually, was engaged in business as a building contractor, operating under the name of Rau *Contracting* Company (R. 215). Gus Rau was also vice president and treasurer of Petitioner corporation Rau *Construction* Company; but his individual operation as Rau Contracting Company was entirely independent of and had no connection with petitioner, Rau Construction Company (R. 215, 1284, 1323-4, 1924, 1925).

On March 21, 1939, Gus Rau notified Phillips Company that he would like to submit a bid on the concrete construction embraced in Phillips Company's projected building program above mentioned, and Phillips Company accordingly sent to him a set of instructions to bidders and a set of the specifications applicable to concrete work (R. 118-119, 1798).

The instructions to bidders gave notice that bids would be received not later than April 7, 1939, "for concrete work at our Borger Refinery and Central Treater

near Borger, Texas"; that "the concrete will be tank bases, engine blocks, cooling towers, building piers and floors, pipe trenches, pipe supports, etc.," and would amount to approximately 6,000 cubic yards at the Refinery and the same quantity at the Central Treater (R. 46). The instructions said (R. 46-47):

> "As the drawings for the individual structures are incomplete at this date, we desire that bidders submit quotations on the individual items as listed on the attached proposal sheet. * * *
>
> "Bidders shall examine carefully all documents, shall visit the site of the work, and acquaint themselves with all conditions pertaining to the work. A specimen contract form, of the type to be executed by the parties to this agreement, is attached. Bids shall be made on the attached proposal sheet and must be itemized as set out thereon."

The specifications described in detail the required quality and the method of mixing, placing, finishing and curing the concrete, and the required methods to be followed in the excavation, form work and other work incidental to concrete construction (R. 47-57).

On April 5, 1939, Gus Rau visited the site of the proposed construction at Borger, Texas, in order to acquaint himself with the conditions (R. 216, 1479-80). He there inspected the two existing plants of Phillips Company (R. 217-221, 222-4, 1480-4), where he could see, in existing structures, substantially all of the various types of concrete construction to be errected in the proposed new work (R. 114-117).

Gus Rau's Conversations with Phillips Company's Employees Prior to Written Contract.

While at Borger on April 5th, Gus Rau talked with two or three of Phillips Company's employees and acquired information from them regarding concrete structures in the existing plants (R. 218, 220, 1480-4).

On April 8, 1939, Gus Rau called at Phillips Company's office at Bartlesville, Oklahoma, where he met a Phillips Company engineer named Charles W. Hubbell (R. 225). Gus Rau testifies that he asked Hubbell for a "cross section" of the work to be done, which Gus Rau defined as follows (R. 225):

> "A cross section is the sizes, the types of the different items, concrete items, making up a portion or the whole of the amount of concrete that is to be poured on any particular job."

He says that Hubbell read from some document a number of different concrete items, with the amount of yardage in each; and after reading off enough items to total about 2,500 yards of concrete, Hubbell stopped reading and said that Gus Rau "could consider the rest of the concrete to be the same" (R. 226). One Calloway, who accompanied Gus Rau, substantially corroborated Gus Rau's version of the conversation (R. 1497-1506). A memorandum of the items read off by Hubbell was made at the time by Calloway, which, according to Gus Rau, expresses "the results of the conversation with Mr. Hubbell." A facsimile reproduction of this memorandum is in the record (R. 227).*

Hubbell testifies that in the conversation aforesaid Gus Rau did not ask for any "cross section"; that he (Hubbell) had prepared no "cross section"; and that if he had undertaken to do so, it would not have been in the form of the above memorandum (R. 1746). Other witnesses testified that this memorandum was not a "cross section" of anything (R. 1771-2, 1928).

Hubbell testifies in substance that his conversation with Gus Rau was as follows (R. 1743-4): Gus Rau said he wanted to know the size of the concrete items to be erected,

---

*All testimony offered by petitioner Rau Company, as to oral conversations between Gus Rau and Phillips Company's representatives, prior to the making of the written contract, was received by the District Court over Phillips Company's objections (R. 217-18, 219-20, 226, 233, 234, 1550, 1870, 1897).

and asked to see the plans therefor; and Hubbell said there were none.* Hubbell said to Gus Rau that he had on his desk a cost estimate which contained in some detail the concrete items to be built; and he offered to and did read off a list of items therefrom. As he read off each item, he would give a general description of it by name, and would state the cubic yards of concrete which it was estimated that the item would contain. After reading off 30 or 40 items Hubbell suggested that the items he had read should be sufficient to show the range and size of items to be built. Hubbell told Gus Rau that the cost estimate from which he was reading was simply the best estimate that could be made at the beginning of a job as to the over-all cost, but it was subject to variations as the job progressed. Hubbell called attention specifically to the fact that in reading from the cost estimate he had not read off any small items of construction; and he explained that it was Phillips Company's practice not to incorporate in a cost estimate small items, involving only a few dollars, but rather to lump them in without itemizing them. Hubbell told Gus Rau that there would be a great many small items to be built. Hubbell also told Gus Rau that definite information as to quantities of material to be used were not available; and that it was for that reason that Phillips Company was taking bids on the work in the form of unit prices rather than in a lump sum for a complete job (R. 1746). Hubbell's testimony was corroborated by that of another witness who was present at the conversation (R. 1647-8, 1666-7).

The Contract.

On April 8, 1939, Gus Rau submitted to Phillips Company his bid in writing, wherein he said (R. 70-1):

> "Having carefully examined the instructions to bidders, the contract, and the specifications, the un-

*It was true, as stated in the "instructions to bidders" (R. 46), that no plans had then been prepared by Phillips Company (R. 120, 1742, 1845).

dersigned proposes to furnish excavation, back fill and disposal of excess excavated material, form construction and removal, reinforcing steel, wire mesh, and anchor bolts, furnishing and placing of concrete, and all incidentals for concrete structures at the Borger Refinery and Central Treater near Borger, Texas, in accordance with the said documents, for the following sums, quantities measured in place:" (Here follow his proposed unit prices.)

"If this bid is accepted, I, or we, agree to enter immediately into a written contract covering this work, and to furnish surety bond within the specified time."

In a letter accompanying the bid Gus Rau supplemented his proposal by further conditions and covenants as follows (R. 71-2):

"1. Water and electricty are to be furnished by the Phillips Petroleum Company without charge to us.

2. No rock excavation is figured in our bid.

3. Expansion joints will be installed at actual cost of material and no charge made for labor.

4. Anchor bolts, nuts and sleeves, you to furnish same, also location of same. We will install bolts at unit price of $.24 per bolt.

5. We will install concrete plant with a capacity of 1,000 yards every 24 hours. We will have necessary equipment such as steam shovels, tractors, trucks, hoists, towing and small tools to take care of job. We will have concrete plant in operation in two weeks.

6. We will furnish bond in the amount you desire. You are to pay for premium of same."

There were five other bidders on the concrete work (R. 108-9). The bid of Gus Rau was accepted and he was accordingly notified (R. 125, 365, 1800). Thereafter a written contract was entered into between Gus Rau and Phillips Company, dated April 10, 1939 (R. 126, 366, 1802-3). The contract is numbered "P. P.-1617" (R. 5).

The contract provided that Gus Rau agreed to perform the "concrete work for Borger Refinery and Central Treater in connection with polymerization program and refinery extension as provided for herein, and in accordance with the plans and specifications"; that he would "begin said work within two weeks and proceed diligently with said work to completion; and to complete same as quickly as drawings are completed"; that he would "perform the work to the entire satisfaction of the Engineer" (Phillips Company's Chief Engineer), and in accordance with the attached specifications, and with plans "to be furnished later" (R. 5). The contract gave Phillips Company the right "to make such changes in the plans and specifications as may from time to time appear necessary or desirable, or as may be recommended by the Engineer, and such changes shall in no way invalidate this agreement" (R. 6). In regard to extra work the contract provided as follows (R. 6):

> "Contractor shall not be entitled to any payment for extra work performed, unless such work shall have been specifically authorized in writing by the Engineer. The amount and method of payment for any such extra work shall be approved by both Contractor and Engineer before such work is commenced. The Contractor shall submit to the Company on the first and fifteenth of each month, a detailed statement of the amounts due for extra work."

The contract provided further (R. 7-8):

> "Contractor shall obtain data on quantities necessary for the proper performance of the work from such sources as he sees fit to rely upon. Company will not be held responsible for any quantities expressly stated or implied by any of its representatives, except in so far as the dimensions shown on drawings affect such quantities. Contractor shall assume entire responsibility for examination of the premises and acquaintance with all conditions."

Regarding payment to the Contractor the contract provided (R. 14):

> "As full and complete consideration for the work performed under this contract, the Company shall pay to the Contractor at the times and places, and under the conditions provided herein, the following sums and amounts of money for work done:

"1. Excavation, including backfill and disposal of excess material	$ .53 per cu. yd.
2. Forms and form removal	.154 per sq. ft. contact area
3. Reinforcing steel	.045 per lb.
4. Wire mesh reinforcing	.0712 per lb.
5. Expansion joints - actual cost of material only	
6. Anchor bolts, nuts, and sleeves	.089 per lb.
7. Class A (1-2-4 concrete)	9.75 per cu. yd.
8. Class B (1-2 1/2-5 concrete)	9.05 per cu. yd.
9. Class X (1-2-4 quickset concrete)	10.50 per cu. yd.
10. Class Z (1-2) grout	13.92 per cu. yd."

The contract provided that Phillips Company's Engineer would on the 1st and 15th days of each month submit an estimate of the quantity of work done, and that Phillips Company would pay Gus Rau, approximately ten days after date of estimate, 85 per cent of the quantities estimated to be due him; and that the remainder of the consideration would be paid after final completion of the work (R. 15). The contract provided that it should "inure to and be binding upon the * * * successors * * * of the parties hereto" (R. 15). It further provided that "the general conditions of the contract, the specifications and the drawings, together with this agreement, form the contract and that they are as fully a part of the contract as if hereto attached or herein repeated" (R. 17). The contract was signed by Phillips Company through A. H. Riney (Vice President), and by Gus Rau individually (R. 1182-3).

In lieu of surety bond guaranteeing performance by the Contractor, petitioner, Rau Company in writing assumed or guaranteed "all liabilities contracted by" Gus Rau for the job (R. 72, 136-7, 367, 1800-1, 1802). This

guaranty was signed "Rau Construction Company, by K. E. Rau, President" (R. 72). This was the first time that Rau Company entered the transaction; and at this stage it was merely as guarantor of the liabilities of Gus Rau, the Contractor (R. 1324).

On May 18, 1939, or 38 days after date of contract, upon request of Rau Company and Gus Rau and by consent of Phillips Company, Rau Company succeeded Gus Rau as Contractor under the written contract (R. 74, 126-7, 864, 1093-4, 1837, 1909, 1925).

On June 17, 1939, the written contract of April 10, 1939, was modified by a supplemental agreement in the form of a letter of Phillips Company's Chief Engineer to Rau Company, agreed to in writing by Rau Company, which provided for certain additional unit prices (R. 18-19, 1183):

Performance by Gus Rau and by Rau Company under Contract, and Payments by Phillips Company Thereunder.

Gus Rau moved his equipment to Borger about April 20, 1939, entered upon the performance of the contract about April 27, 1939 (R. 367-8, 820), and continued until he was succeeded by Rau Company on May 18, 1939, as above stated. Rau Company continued performance under the contract, as successor of Gus Rau, until November 14, 1939 (R. 883). Thus the total period of performance under the contract by Gus Rau and by Rau Company was about seven months.

The procedure during this interval was as follows (and the District Court so found—R. 1926): Phillips Company from time to time would supply the Contractor plans of structures to be erected (R. 371, 436-654). Phillips Company would stake out the locations and would give notice in writing of items ready for construction (R. 371, 411-436). After the Contractor had completed a given item, Phillips Company would calculate the quantities of material used therein and the amount due therefor at the

contract price; and would write this information upon a printed form known as an "extra work order," which would then be submitted to the Contractor for checking and acceptance. The Contractor would check its accuracy and, if it was found correct, would indicate approval by signing it as follows: "Accepted by Rau Construction Company, Contractor" (R. 965, 947, 973, 1862).

The form of "extra work order," as its name implies, was originally designed some years ago for use by Phillips Company in directing a Contractor to perform extra work, *i. e.*, work not covered by a contract; but in this case the form was by common consent used as a memorandum to state the agreement by Phillips Company and the Contractor as to quantities involved and amount due Contractor on each item of work and materials furnished (R. 1645, 1660-1, 1844-5, 1862, 964-5, 1305-8). The district court found (R. 1927):

> "Every structure built by Gus Rau and plaintiff was covered by a work order on the form described in Paragraphs 17 and 18 hereof, which purported to cover all of the materials and work furnished by Gus Rau and plaintiff, specified the unit prices therefor, and the total amount of money due therefor. All of said work orders were accepted and signed by Gus Rau and plaintiff, and, except for work orders totalling $982.30, for which plaintiff sues and defendant offers judgment, payment was made to plaintiff by defendant in accordance therewith in the amount of $230,260.04."

The work orders were audited by Phillips Company's home office staff at Bartlesville, and any errors found were corrected (R. 1662, 1696, 1697, 1185, 1307). The amount involved in the corrections was inconsequential. Only 37 work orders of the total of approximately 740 were thus corrected; the corrections in favor of Rau Company totalled $721.79; corrections in favor of Phillips Company totalled $982.56; the balance of corrections was therefore $260.77 (R. 1698). Notice of the corrections was given

to Rau Company, through copies of statements periodically sent to them with checks.

Based on the figures in the work orders, periodical statements (on a printed form called "Contract Estimate") were prepared by Phillips Company as the basis for periodical payments to Rau Company (R. 147, 974, 977-1086, 1327-1349, 1351). Each statement recited that it was made "per contract," being "Contract No. P. P.-1617"; and it named Rau Company as the Contractor. It listed the work orders which it purported to cover, by number, described the work covered thereby, stated the cubic yardage or quantities involved and the amount due therefor in dollars and cents (See facsimile reproductions of these statements at R. 977-1086, 1327-1349).

Duplicates of these statements, together with drafts in payment of amounts shown due thereby, were sent to Rau Company periodically by Phillips Company (R. 1352-1367). There were 26 such drafts in all, issued between June 3, 1939, and December 20, 1939 (R. 1089-1090, 1244). Each draft recited on its face: "In full settlement of the within account" (R. 1089). The final draft dated December 20, 1939, for $1,787.51, was returned by Rau Company's counsel, because the letter enclosing it had recited that it was in final payment, and because by that time Rau Company was asserting additional amounts due (R. 1244). All drafts except this last one were endorsed by and paid to Rau Company (R. 1090), totaling $230,261.

Recognition by Both Parties of the Validity of the Contract.

Rau Company never denied or questioned the validity of the contract during the whole progress of the work (R. 1787, 1858). The record is replete with documents emanating from Rau Company or signed by its officials and representatives, which referred to and apparently recognized the contract (R. 897-8, 1125, 1126, 1129, 1130, 1141, 1276-7; and see Defendant's Exhibit 16, received in evidence at R. 969, sent to the Circuit Court of Appeals

for inspection, said exhibit embracing the work orders, approximately 740 in number).

The first time that Rau Company inferentially questioned the validity of the contract was on November 24, 1939—7 1/2 months after date of contract (R. 5), and 10 days after it had ceased performance under the contract (R. 883)—when for the first time it advanced the claim that Phillips Company had misrepresented the job to Gus Rau (R. 176, 1156-7, 1820, 1858, 888). The first time Rau Company definitely denied the validity of the contract was on January 2, 1940, when it filed this suit (R. 1, 3).

Phillips Company at all times recognized the contract as in full force and effect, as shown by hundreds of letters (R. 429-30, 435, 437-651, 898-9, 903, 1122-3, 1136, 1140, 1352, 1354-67, 1381), estimates (R. 977-1082, 1327-49), and work orders (R. 75, 969).

Contentions of the Parties in the Court Below.

In its complaint, as above stated, Rau Company attacks the validity of the contract of April 10, 1939, on the grounds of fraud (R. 2, 3) and abandonment (R. 3). The complaint does not challenge, but impliedly recognizes, the validity of the supplemental agreement of June 17, 1939 (R. 3, 37). The complaint prays judgment for these amounts (R. 4):

For alleged "Additional work required due to changes from cross section,"	$88,480.50
For alleged "changes in forms" caused by changes in plans and by delays,	35,597.16
For alleged "overtime,"	4,392.20
For alleged "balance on E. W. O. account,"	982.30
For alleged "fine grading,"	230.16
For alleged "tooled edging,"	152.98
Amount prayed, after crediting $368.34 overpayment on anchor bolt account,	$129,467.96

Phillips Company denies the alleged fraud and abandonment (R. 61, 66-68); asserts the validity of the contract

of April 10, 1939, and of the modification of June 17, 1939; contends that the contract as modified covered the work and materials furnished; contends that the work orders signed by the parties constitute binding agreements as accounts stated; contends that by Rau Company's acceptance of drafts tendered "in full settlement" there has been an accord and satisfaction, and that full payment has been made to Rau Company for all work performed, except the following, which it has offered to pay (R. 66-67, 111):

Balance on E. W. O. (extra work order) account	$ 982.30
Overtime for June 16 and 17, 1939	230.60
For settlement of form claim (R. 1868),	1165.67
	$2378.57
Less conceded credit for overpayment on anchor bolt account	368.34
Balance conceded,	$2010.23

The Decision Below.

The case was tried without a jury. The District Court held the contract void upon the two alleged grounds of fraud (R. 1906, 1909-10, 1917-19) and abandonment (R. 1921), also upon other grounds not alleged in the complaint (R. 1-4), namely, uncertainty and lack of meeting of the minds as to subject matter (R. 1874, 1875, 1876, 1909) and lack of mutuality (R. 1909).

Thus sweeping aside the written contract between the parties, the District Court gave judgment in favor of Rau Company and against Phillips Company in the full amount sued for, $129,467.96 with interest aggregating $140,582.53 (R. 79, 1932).

The opinion of the Circuit Court of Appeals reversing the trial court is abundantly fortified by the authorities cited in support of each point decided and requires no argument to sustain it.

Other points were urged upon the Circuit Court of Appeals by Respondent which that court found unnecessary to decide, but which, except for abundant other grounds for reversal, would have required a reversal. These grounds were:

1. Statements made to *Gus Rau* while he was acting upon his *individual* business, as here, were not statements to *Rau Company,* even though Gus Rau happened to be an officer of that company (*Merchants National Bank* v. *Lovitt,* 114 Mo. 519, 525, 21 S. W. 825, 826; *Johnston* v. *Shortridge,* 93 Mo. 227, 231-2, 6 S. W. 64; *Gregmoore Orchard Co.* v. *Gilmour,* 159 Mo. App. 204, 213-14, 140 S. W. 763, 765; *Benton* v. *German-American National Bank,* 122 Mo. 332, 339, 26 S. W. 975; *Kearney Bank* v. *Froman,* 129 Mo. 427, 430, 31 S. W. 769).

2. Statements made to Gus Rau could not be made the basis of a cause of action by Rau Company, to which company the statements were not made and for which company they were not intended (*Western Union Teleg. Co.* v. *Schriver,* (8 C. C. A.) 141 Fed. 538, 542; *New York Title & Mortgage Co.* v. *Hutton,* (Ct. Apps. D. C.) 71 F. 2d 989, 991-2; *Webb* v. *Rockefeller,* 195 Mo. 57, 74, 93 S. W. 772; *Rawlings* v. *Bean,* 80 Mo. 614, 619-20). This point was specifically presented by Phillips Company's requested Conclusion of Law No. V, which was erroneously refused by the District Court (R. 1932).

The Circuit Court of Appeals held that the statements attributed to Respondent did not amount to fraud, so found it unnecessary to pass upon the above points.

The Petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 503.

RAU CONSTRUCTION COMPANY, A CORPORATION,
PETITIONER,

VS.

PHILLIPS PETROLEUM COMPANY, A CORPORATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITIONER'S PETITION FOR REHEARING.

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Counsel for Petitioner.

Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR REHEARING.

1. Under Rule 33, rehearing is respectfully prayed of the denial on December 7, 1942, of petition for writ of certiorari to review the decision of the Eighth Circuit, reported 130 F. 2d 499 (R. 1987), which reversed *quantum meruit* judgment of $140,582.53. Lawful trial Findings either have no more substance than dreams, or, if they possess the dignity and virtue declared by both Rules and decisions, they should be accorded that effect.

2. Coordinately created with rules of judicial administration is the duty to require their consistent observance by subordinate authority. The ultimate responsi-

bility rests here for the violation and evasion of the Rules and decisions promulgated by this Court to govern on appeal. Equal protection of laws must be implemented by enforcement, or uniform substantive rights duly invoked (R. 1998; Petition for Writ, pp. 11, 22), although secured by mandate of the sovereign people, have no reality. By solemn declarations, this Court has decreed that a Circuit Court of Appeals is without authority to weigh evidence or to make its own findings of fact and that lawful trial Findings are binding on appeal unless set aside under the prescribed conditions. The petition for the writ, perhaps too mildly, pointed out the repudiation of petitioner's fundamental rights, by the suppression without consideration of too many lawfully supported trial Findings for mere coincidence and the usurpation of authority in substituting unsupported fiction for binding facts. Attention is plainly directed thereto, without reservation or exaggeration, not as a pleasant but as a mandatory duty. The obligation is common to both Bench and Bar to maintain uniformity in the administration of justice, and to guard it from navigating in the murky waters of the River of Doubt.

3. The facts are publicly recorded in the trial Findings (R. 1898), and printed record. They are too inevitably clear to shift responsibility. Petitioner makes its final appeal for its secured rights, before accepting destruction to join the spectral shades of its denied inherent rights, as the loss exceeds its capital and surplus (R. 73). Before exclaiming: "*Ubi jus incertum, ibi jus nullum; vale, morituri te salutamus,*" and reflecting on Luke, 23:28, "Weep not for me," etc., it confidently believes that review may not be denied if this Court, in common fairness to petitioner (and to the trial court, which faithfully and correctly discharged its duties), will but consider Finding 23 (in R. Vol. 6, p. 1914), and the preceding Finding 22. We do not believe the request to read that much of the actual Findings is an imposition, despite the recognized

burdens of the Court. While the record is extensive, the issues and facts are not complicated.

4. In directing reversal of $140,582.53 and judgment entry for $2,010.23 under Phillips' judgment consent, the opinion (R. 1993) rests on usurped authority in finding unsupported double untruths as facts. It declares that the evidence showed no error in Phillips' non-existent final statement of $2,010.23, prepared before suit. Phillips never so claimed, nor does it now seek to sustain it. Its brief here (p. 12) admits the final statement was for $1,-785.51, which was returned refused. The aggregate allowance of $4,775.34 for overtime, fine grading and tooled edging, all additional work items required outside of any possible express contract terms, recovered under Complaint, Pars. 13 and 14 (R. 2, 3), fixed by Findings 23, 28 and 29 (R. 1914, 1919, 1920), which were wholly suppressed without mention or consideration and of $35,597.16 allowed for concrete forms and panels built according to issued plans and not paid for, conclusively show the error of these unauthorized appeal Findings. These items were all recoverable, whether or not the alleged contracts, pleaded as a defense, were held *valid or invalid.* Finding 28 determines that Phillips even admitted part of the sum allowed for fine grading. Overtime of $4,392.20 was found by Finding 23 to have been arbitrarily required for Phillips' convenience, after its definite contrary promises and its receipt of notices of June 1 and June 27th (R. 896, 1121) that there was no contract right therefor and payment would be required. Contract, Par. 29 (R. 12), denies the right to require overtime and prohibits even voluntary overtime without Phillips' Engineers' consent. Attempted denial of authority of Phillips' Engineers ordered to expedite the work was the only overtime defense offered. That fact; their authority and the compulsion exerted to procure overtime and every other item reversed, by the threats made wholly without contract right and contrary to the terms thereof, to take over all material, machinery

and equipment, by excluding the Rau Company from Phillips' fenced and guarded premises, and to withhold all payments, is established by Findings 23, 20 and 24 (R. 1910, 1914, 1917). All of these Findings and Finding 32 (R. 1921), determining that there was *nothing in the entire evidence upon which to predicate a waiver, estoppel or ratification* by Rau, were concealed and suppressed without mention or consideration thereof in any way. It stands lawfully unchallenged by these evaded Findings, which were *not set aside,* that it was impractical for Rau to discontinue the work, but that it *was obliged by the necessities of the situation to proceed, regardless of the lack of justification of Phillips' demands and the additional expense caused thereby.* Suppressed Finding 1, R. 1898, determined that Phillips' judgment offer included $230.60 for *overtime* (cf. $4,392.20 overtime due, fixed by Finding 23), and $1,165.67 for concrete forms and that the original answer admitted $2,108.58, or $98.30 more than the non-existent statement before suit, upon which the direction of reversal rests.

5. It was conceded nothing was paid on any item in suit. The aggregate indebtedness is recapitulated in suppressed Finding 31, R. 1920. Overtime and concrete forms were invoiced September 16th (R. 1136, 1139). The then known cross section differences were also called to Phillips' attention by letter (R. 1138, Ex. 30), all admittedly received. Phillips' statement here (Brief, p. 2) that no claim was made until after completion on November 14, 1939, is denied by the record. The unauthorized, unsupported appeal finding of alleged accord (R. 1993) or compromise, are not only impossible, but deny contract, Par. 35, R. 15, which specifies the payment due date, for extra and additional work as thirty days after acceptance, or December 14th. The last payment accepted was December 3rd, for money concededly due (not including anything on account of any item in suit), paid conditionally to discharge bills due, to protect Phillips' property from lien

claims. Rau did not meet deceit with deceit, but faithfully discharged its every obligation. It relied on the courts for redress for the duress, fraud, concealment and oppression practiced. The lawful, binding facts, fixed by an able trial court who determined and declared them from the testimony of witnesses before him, whose acts, conduct and intent were truly weighed and measured, were concealed, evaded and suppressed. Fiction was substituted for fact, by usurped jurisdiction. Rau was stripped of its entire resources, with costs of $4,813.25 assessed for its temerity in presenting binding established facts showing the virtual state of peonage which was enforced within Phillips' guarded fence. Examples of the power of Phillips were applied at intervals, that the power could not be forgotten. Automobiles of Rau's officials and employees were arbitrarily excluded, while other contractors were admitted, even while night work was wrongfully compelled, causing injury to one employee forced to walk in the dark (R. 886, 1692-3). Progress was delayed but at Rau's expense. That a Union Representative might enter Phillips' sacred confines in some Rau automobile was the only excuse ever given. The actual reason may be inferred from the facts fixed by Findings 20 to 25, R. 1910-1917. No covenant to "abandon all hope, ye who enter here," was expressed in any contract—either upon entering Phillips' fence, or any court.

6. Correction of the unwarranted errors and fiction was denied on prayer for rehearing (R. 2001), obviously because the facts fixed by Finding 23 for overtime of $4,392.20, could not be answered, denied nor set aside. If mentioned or recognized at all, then, automatically, the entire opinion would disintegrate, because the fictions upon which the appeal findings of "opinions but no fraud"; "waiver of fraud"; "no abandonment nor breach" and "no error in Phillips' nonexistent statement," could not survive. Findings 20 to 25, R. 1910-1917, could no longer be concealed. Every fiction upon which each conclusion of the opinion rested would wither in the clear light of unsup-

pressed truth. Judgment for $88,481.50 for cross section differences (Findings 26, 27, R. 1917) could not then possibly be reversed. Recognition of Finding 1, that the judgment offer included $1,165.67 offered for concrete forms would not permit denial of the facts fixed by Finding 22, R. 1912, last paragraph, quoting Phillips' inter-company letter, that $472 thereof was offered for *loss of re-use of forms*. The fallacy of the extra-jurisdictional appeal finding that nothing in the conduct of the parties nor in the words of their agreement, justified the allowance for *loss of re-use of forms* would have to be confessed. It could not be denied that the allowance was made under Complaint, Par. 10, R. 3, for changes made in concrete forms, form panels and form sets, requiring refabrication and expense in changing them, per itemized statement. It would stand confessed that Finding 22, R. 1911, establishes the truth of Exhibit 5 (R. 295), and fixes as fact that 53,419.5 square feet of forms were built exactly according to issued plans, but were never paid for and (R. 1914), absent the oral agreement of ten cents per foot for both forms and panels, Rau was entitled to 15.4¢ per foot therefor instead of the 10¢ allowed. Denial could not be made of trial Finding 22, that Phillips produced no record of form losses, although its engineers were ordered to keep a record, and that payment was to be made under contract, Par. 35, R. 15, thirty days after completion. The judgment offer was based alone on unsupported memory. The opinion accepts it in preference to facts. The misstatement of contract, Par. 5, R. 6, would have to be corrected, to say that while it permitted changes in plans, it concurrently fixed the liability to pay for the work caused by changes or alterations. The so-called supplemental agreement, as it states, merely fixed a price for part of that conceded liability, but the substantive right of recovery arose because the alleged contract *did not exclude but recognized liability* for the extra work caused by plan changes and alterations. Affirmance of the $35,597.16 would have to follow, because

the finding that Phillips paid nothing whatever for any forms or form panels built according to plans, when concrete could not be poured therein, because of the 215 subsequent changes made in plans after issue, all as fixed and found to be admitted by its Chief Engineer, could no longer be suppressed. Reversal for Phillips under usurped authority, with fiction replacing fact, apparently was deemed more important than truth. Justice is mythical if there may be denial of the fundamental right of affirmance under the lawfully established facts. Rules and decisions are truly no more than "scraps of paper."

7. The denial of fraud on appeal (Opinion (2), R. 1989) is based *only on a fact finding,* made without authority. The Complaint charged (R. 1-5) and Findings 5 to 15, R. 1900-1906, established fraud and every element. The answer (R. 61-68) admitted the authorized supplying of an inaccurate "cross section" and inaccurate information, after notice that the information required for contracting was not otherwise obtainable. It pleaded in avoidance that all information given was based on estimate and guess; that Mr. Rau and plaintiff knew thereof and did not rely thereon. Under the decisions of this Court from its earliest days, the fraud issue was a fact question. The opinion conceals the binding facts that petitioner was without that knowledge; that it relied upon and was entitled to rely on the accuracy of the cross section and information given; that the information was solely known to Phillips, who deceived plaintiff by information given and withheld, knowing that it was untrue and relied upon; that it was material and so known to Phillips and caused damage. The trial fraud findings are evaded but not discussed, clearly because they firmly establish that the information was given and relied upon as representations of fact and not as opinions or expectations. The facts and both Missouri and Texas law, were denied on appeal. The trial findings resolved the facts against Phillips. They were not and could not be set aside because not supported or because clearly

erroneous. The decision usurped authority in making an independent, contrary Finding, despite evidence, trial Findings and contract terms. It suppressed and concealed that Phillips, by its authorized engineer, supplied false information and a false engineering "cross-section" to falsely depict "the general conditions of the contract," *which were expressly made part of the contract, as fully as if thereto attached or therein repeated,* by contract, Par. 42 (R. 17).

8. The appeal findings of certainty of the subject matter, not only conceal and suppress the facts, but misrepresent the reasons assigned by the trial court therefor. The opinion (R. 1988, sub. 1), contradicts Findings 16, 17 and 18 (R. 1906-1909), in asserting that the conviction of the trial court of "no meeting of minds on the contract subject matter of the work" was based on the fact that the dimension and sizes of units were unknown. The trial Findings clearly establish the ultimate finding was made on the facts found that there was no method supplied by the "contract" to determine *what concrete work* was included or excluded. Phillips did not know and it was an obvious fact that plaintiff could not know. It was found that contract, Par. 1 (R. 5), specified "concrete work" for the refinery extension and polymerization "program," but that concurrent "program" concrete work was carried on by Phillips and other "program" concrete was built by others, before and after plaintiff left. Phillips even hired Rau's employees away to carry on the "program" concrete work (R. 1538-39). Unit 19 work by Rau was stopped, because it was not scheduled until the following January (R. 1642, 1620). If the plans as issued (with concurrent false promises that later plans for large items would bring the job up to representations relied upon) could properly be held to supply the original uncertainty of subject matter, as the opinion holds, the binding facts concealed destroy the ruling. The so determined "certainty" became highly uncertain by the 215 changes in plan made after first issue (Finding 17, R.

1908). The later "finding" that the right to change plans was reserved, suppressed the provision requiring payment for the extra work so caused. Such an unrestricted right effectually would create complete uncertainty of the subject matter of a construction contract.

9. Findings of abandonment or breach were thrust aside, in defiance of the facts clearly established by suppressed Findings 20, 23, 24 and 33 (R. 1910-1921). The appeal findings made on waiver of fraud, accord and compromise are not only without authority, but are denied by the facts fixed by binding findings, which could not be lawfully set aside. Such attempt was not undertaken, but evasion, suppression and fiction were relied upon to conceal and replace them.

10. The issue of which court has jurisdiction to determine facts is presented as concisely and clearly as ability permits. Equal justice for all, with special privilege to none, is an essential of democracy. If Phillips may profit by special privilege, is such privilege limited to petroleum companies? Inequality of administration strikes at the root of justice. The careful labors of an able trial court are indeed "unhonored and unsung," if the reasons guiding it may be misrepresented and forever recorded in the reports, and if supported truth established and fixed according to law, may be distorted, suppressed, concealed and replaced by unauthorized fiction, to effect an unwarranted reversal. The facts are inescapable, as a casual reference to the trial Findings will show. That every trial Finding is supported by substantial evidence, counsel certifies from an intimate knowledge of the trial and record. Phillips' evidence virtually supports all, except those on the amount of recovery for each item. Its Engineers checked the data before trial on every recovered item. No errors were shown.

11. Certainty of justice is an ideal for which this Court has long labored. We do not believe that review has ever been denied where there has been a fair appearance that

it had not been attained. If counsel has discharged his duty in reflecting the facts, as he believes has been done, a review should follow as of course, with correction and admonition for non-compliance with authoritative rules of judicial administration.

MAURICE J. O'SULLIVAN,
Counsel for Petitioner.

Certificate of Counsel.

Maurice J. O'Sullivan, counsel for petitioner, Rau Construction Company, certifies that the foregoing petition for rehearing is presented in good faith and not for delay, and because counsel firmly believes that the petitioner is entitled to a rehearing as a matter of right to accomplish justice in accordance with the accepted course of judicial proceedings.

MAURICE J. O'SULLIVAN,
Counsel for Petitioner.